IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLIED-HUNTER CORP.	:	CIVIL ACTION
	:	
v.	:	
	:	
THE DUN & BRADSTREET CORPORATION	:	NO. 00-1310

MEMORANDUM AND ORDER

Fullam, Sr. J. May , 2000

Plaintiff paid the defendant $2,000 for a credit report on a prospective customer and allegedly extended credit to that customer in reliance upon the report supplied by the defendant. Unfortunately, the customer went bankrupt and plaintiff lost more than $179,000. Plaintiff alleges that the defendant had, within its own files, derogatory information about the customer which could readily have been obtained through adequate cross-reference of its own materials, but failed to disclose that information in the credit report furnished to plaintiff. Plaintiff has brought this action to recover the $179,000 it lost.

The defendant has filed a Motion to Dismiss, asserting that the complaint fails to set forth a claim upon which relief can be granted. Defendant relies upon exculpatory language in the contract between plaintiff and defendant. Since that contract is attached to the complaint, the motion can properly be considered under Fed.R.Civ.P. 12(b)(6).

The contract between plaintiff and defendant includes the following language:

> "10.3 CUSTOMER AGREES THAT D&B DOES NOT AND CANNOT FOR THE FEES CHARGED GUARANTEE OR WARRANT THE CORRECTNESS, COMPLETENESS, CURRENTNESS...OF ITS SERVICES. CUSTOMER AGREES NOT TO HOLD D&B LIABLE FOR ANY LOSS OR INJURY ARISING OUT OF OR CAUSED, IN WHOLE OR IN PART, BY D&B'S NEGLIGENT OR OTHER ACTS OR OMISSIONS IN PROCURING, COMPILING, COLLECTING, INTERPRETING, REPORTING, COMMUNICATING, OR DELIVERING SERVICES...
>
> 10.5 CUSTOMER AGREES THAT D&B SHALL NOT BE LIABLE TO CUSTOMER FOR NEGLIGENCE, RECKLESSNESS OR INTENTIONAL MISCONDUCT OF THIRD PARTIES.
>
> 10.6 CUSTOMER AGREES THAT D&B SHALL NOT BE LIABLE FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, (INCLUDING LOSS OF PROFITS) EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. CUSTOMER PROMISES NOT TO SUE D&B FOR EXEMPLARY (I.E. PUNITIVE) DAMAGES.
>
> 10.7 CUSTOMER AGREES THAT D&B'S LIABILITY FOR A PARTICULAR CLAIM SHALL NOT EXCEED THE AMOUNT PAID FOR THE PARTICULAR SERVICE FURNISHED UPON WHICH THE CLAIM IS BASED OR $20,000, WHICHEVER IS GREATER, AND PROMISES NOT TO SUE D&B FOR A GREATER AMOUNT."

Plaintiff counters the defense argument by pointing out that the complaint charges the defendant with gross negligence; plaintiff argues that the exculpatory language quoted above bars, at most, liability for ordinary negligence. Plaintiff also contends that the exculpatory language is included in a contract of adhesion, and is invalid and not binding for that reason.

I am not persuaded that the contract is unenforceable as a contract of adhesion. The parties were both commercial

entities, there was a legitimate business purpose for the exculpatory language, and the contract does not involve a necessity. See, Denlinger, Inc. V. Dendler, 608 A.2d 1061 (Pa. Super. 1992); Egan v. Atlantic Richfield Co., 566 A.2d 1249 (Pa. Super. 1988). And the contract cannot properly be deemed so oppressive and one-sided as to be unconscionable. See, Seus v. John Nuveen & Co., Inc., 146 F.3d 175, 184 (3d Cir. 1998).

As to whether an exculpatory clause barring liability for "negligence" also bars liability for gross negligence, the reported cases are in some disarray - primarily because of minor differences in the contract language. In Newark Ins. Co. v. ADT Security Systems, Inc., Civil Action No. 96-3469, 1997 WL 539752 (E.D. Pa. Aug. 5, 1997) Judge Broderick held that the term "negligent or otherwise wrongful" conduct does not include gross negligence. In Neuchatel Insurance v. ADT Security Systems, Inc., Civil Action No. 96-96-5396, 1998 WL 966080 (E.D. Pa. Nov. 5, 1998) Judge Pollak reached the opposite conclusion, and distinguished the Newark case because of minor variations in language (and, primarily, because of an intervening decision of the Pennsylvania Superior Court, Valeo v. Pocono Int'l Raceway, 500 A.2d 492 (Pa. Super. 1985).

The present case differs from the cases cited above in one important respect: Although, with respect to defendant's own negligence, the contract uses the language "negligent or other

acts or omissions...," when dealing with negligence of third parties, the contract uses the language: "Negligence, recklessness or intentional misconduct." It thus appears that the contracting parties knew how to exclude liability for "recklessness" (which is synonymous with "gross negligence"), but chose not to use that term when dealing with D&B's own conduct. Because the contract is at least ambiguous to that extent, and because Rule 12(b)(6) permits dismissal only if it is clear that plaintiff cannot allege any set of facts warranting liability, I conclude that the complaint should not be dismissed at this point.

It is, however, quite clear that the defendant's maximum liability cannot exceed $20,000 under any circumstances, and that plaintiff cannot recover "consequential damages." Except for its argument that this is a contract of adhesion (rejected above), plaintiff does not address the $20,000 limitation.

An Order follows.

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ORDER

AND NOW, this day of May, 2000, IT IS ORDERED:

That's defendant's Motion to Dismiss the complaint is DENIED, except that plaintiff's damages recoverable in this action cannot exceed $20,000, as specified in the contract.

John P. Fullam, Sr. J.